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STREETS & STEELE 13100 WORTHAM CENTER DRIVE, SUITE 245 HOUSTON, TX 77065			EXAMINER NGUYEN, SON T	
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* CARL E. WHITCOMB

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Appeal 2010-010133  
Application 10/770,352  
Technology Center 3600

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Before: WILLIAM F. PATE III, STEFAN STAICOVICI, and  
FRED A. SILVERBERG, *Administrative Patent Judges*.

PATE III, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

## STATEMENT OF CASE

Appellant appeals under 35 U.S.C. § 134 from the rejection of claims 1-3, 5-40, 46-50, and 63-74. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

The claims are directed to a plant container and sidewall providing improved management of irrigation and aeration. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A sidewall for a plant container, comprising:
  - a substantially water-impermeable root-tip-trapping region; and
  - a porous air-root-pruning region adjacent the root-tip-trapping region, wherein the root-tip-trapping region is a contiguous upper portion of the sidewall and the air-root-pruning region is a contiguous lower portion of the sidewall.

## REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Reynolds	US 3,080,680	Mar. 12, 1963
Whitcomb	US 4,716,680	Jan. 5, 1988
Whitcomb	US 4,939,865	Jul. 10, 1990
Thomas	US 5,311,700	May 17, 1994
Flasch	US 5,852,896	Dec. 29, 1998
Reiger	US 6,202,348	Mar. 20, 2001
Berlit	GB 2,073,567 A	Oct. 21, 1981
Van der Goorbergh	EP 0,300,578 A3	Jan. 25, 1989

## REJECTIONS

Claims 1, 2, 7, 37 stand rejected under 35 U.S.C. § 102(a) as being anticipated by Reiger. Ans. 4.

Claims 3, 12, 14-20, 26, 27, 32, 33, 46-50, 63, 64, 67, and 68 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Reiger and Reynolds. Ans. 6.

Claims 5, 6, 13, 65, 66, and 69 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Reiger. Ans. 10.

Claims 8, 9, 11, 36, 38-40, and 70-72 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Reiger and Whitcomb '865. Ans. 11.

Claim 10 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Reiger and Whitcomb '680. Ans. 15.<sup>2</sup>

Claim 21 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Reiger, Reynolds, and further in view of Thomas. Ans. 16.

Claims 22-24 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Reiger, Reynolds, and Berlitz. Ans. 16.

Claims 25, 29, and 31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Reiger, Reynolds and Van der Goorbergh. Ans. 17.

Claims 28, 34, and 35 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Reiger, Reynolds and Flasch. Ans. 18.

Claim 30 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Reiger, Reynolds, Berlitz and Flasch. Ans. 19.

Claims 73-74 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Reiger, Whitcomb '865 and Reynolds. Ans. 20.

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<sup>2</sup> Appellant erroneously refers to claim 7 as the subject of this rejection.

## OPINION

We have carefully reviewed the rejections on appeal in light of the argument of the Appellant and the Examiner. As a result of this review, we have reached the conclusion that the applied prior art does not establish the prima facie obviousness of the claims on appeal. Therefore the rejections on appeal are reversed. Our reasons follow.

All of the Examiner's rejections on appeal are based on the Examiner's interpretation of the Reiger reference. A prior panel in Appeal 2008-2136 interpreted the drain holes 146 of Reiger as inherently performing the air-root pruning function recited in Appellant's claim 1. Subsequent to that new ground of rejection entered by the Board, Appellant amended claim 1 to state that the air-root-pruning region is a contiguous lower portion of the sidewall. Appellant amended claim 65 to state that the root-tip-trapping region comprises between  $\frac{1}{2}$  and  $\frac{9}{10}$  of the sidewall and amended claim 70 to state that the air-root-pruning region is formed of a bendable sheet.

Turning to the rejection of claim 1, the Examiner provides a figure on page 5 of the Answer that illustrates an interpretation of Reiger's subject matter. Referring to the drawing, the Examiner has arbitrarily placed a line somewhat above drain holes 146 and demarked the region of the pot lower than the line as the air-root-pruning region. In our view, this is an erroneous interpretation of the subject matter of Reiger. First of all, the line is drawn well above the air vents 146 and we regard its placement as somewhat arbitrary. Secondly, almost the entire region the Examiner has designated serves no air-pruning function. We agree with Appellant that the air-pruning function of this region as demarked by the Examiner would be *de minimis*.

Thus to the extent that the claimed subject matter is directed to an air-root-pruning region that is a contiguous lower portion of the sidewall, Reiger does not teach this subject matter. Therefore the rejections of all claims that depend on claim 1 and that utilize Reiger as the primary reference cannot be sustained.

Inasmuch as we have previously recognized that the line defining the Examiner's air-root-pruning region as shown in the figure on page 5 of the Answer is an arbitrary construct on the part of the Examiner, we also cannot affirm the rejections of the claims that depend on claim 65. Nothing in Reiger teaches that the air-root-pruning region should be  $\frac{1}{10}$  to  $\frac{1}{2}$  of the sidewall of the container. Therefore the rejections of the claims that depend from claim 65 are also reversed.

Finally, the Examiner has rejected the subject matter of claims 70-74 as obvious over either Reiger in view of Whitcomb '865 or Reiger in view of Reynolds. We find nothing in the disclosure of Whitcomb '865 or Reynolds that can ameliorate the problems we have with the Examiner's interpretation of the Reiger reference. Therefore the rejections of claims 70-74 are not sustained.

## DECISION

The rejections of claims 1, 2, 7 and 37 under 35 U.S.C. § 102 is reversed.

The rejection of claims 3, 12, 14-20, 26, 27, 32, 33, 46-50, 63, 64, 67, and 68 under 35 U.S.C. § 103 as unpatentable over Reiger in view of Reynolds is reversed.

The rejection of claims 5, 6, 13, 65, 66, and 69 under 35 U.S.C. § 103 as unpatentable over Reiger is reversed.

The rejection of claims 8, 9, 11, 36, 38-40 and 70-72 under 35 U.S.C. § 103 as unpatentable over Reiger in view of Whitcomb '865 is reversed.

The rejection of claim 10 under 35 U.S.C. § 103 as unpatentable over Reiger in view of Whitcomb '680 is reversed.

The rejection of claim 21 under 35 U.S.C. § 103 as unpatentable over Reiger in view of Reynolds further in view of Thomas is reversed.

The rejection of claims 22-24 under 35 U.S.C. § 103 as unpatentable over Reiger in view of Reynolds and further in view of Berlit is reversed.

The rejection of claims 25, 29 and 31 under 35 U.S.C. § 103 as unpatentable over Reiger in view of Reynolds and Van der Goorbergh is reversed.

The rejection of claims 28, 34 and 35 under 35 U.S.C. § 103 as unpatentable over Reiger in view of Reynolds and Flasch is reversed.

The rejection of claim 30 under 35 U.S.C. § 103 as unpatentable over Reiger, Reynolds, and Berlit in view of Flasch is reversed.

The rejection of claims 73-74 under 35 U.S.C. § 103 as unpatentable over Reiger in view of Whitcomb '865 and Reynolds is reversed.

REVERSED

nlk

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